

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT NASHVILLE

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**DONALD R. SHADRICK, and wife,  
VALERIE SHADRICK,**

Plaintiffs-Appellants,

Vs.

Davidson Circuit No. 94C-4135  
C.A. No. 01A01-9604-CV-00145

**CENTENNIAL MEDICAL CENTER  
and WESLEY L. COKER, M.D.,**

Defendants-Appellees.

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FROM THE DAVIDSON COUNTY CIRCUIT COURT  
THE HONORABLE WALTER C. KURTZ, JUDGE

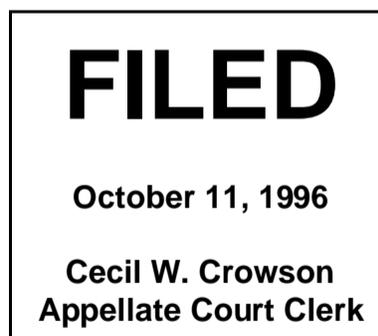
G. Thomas Nebel, John B. Carlson  
Williams & Associates, P.C. of Nashville  
For Plaintiffs-Appellants

Robert L. Trentham, G. Brian Jackson  
Trabue, Sturdivant & DeWitt of Nashville  
For Appellee, Wesley L. Coker

C. J. Gideon, Jr., William S. Walton of Nashville  
For appellee, HCA Health Service of Tennessee d/b/a  
Centennial Medical Center

***AFFIRMED IN PART, VACATED IN PART AND REMANDED***

Opinion filed:



**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

**ALAN E. HIGHERS, JUDGE**

**BEN H. CANTRELL, JUDGE**

Plaintiffs, Donald R. Shadrick and wife, Valerie Shadrick (hereinafter Mr. Shadrick<sup>1</sup>),  
appeal from the order of the trial court that granted summary judgment to defendants, Centennial

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<sup>1</sup> Mrs. Shadrick has a derivative cause of action for loss of consortium and will not be referred to further.

Medical Center (CMC) and Wesley L. Coker, M.D.

In December of 1988, plaintiff Donald Shadrick suffered a disabling work-related back injury. In March of 1989, Mr. Shadrick began seeing Dr. Wesley Coker, an orthopaedic surgeon in Nashville. After examining Mr. Shadrick, Dr. Coker determined that surgery was necessary, and on April 13, 1989, Dr. Coker performed a percutaneous discectomy on Mr. Shadrick's spine. Dr. Coker's office notes for April 18, 1989, indicate that Mr. Shadrick's back pain increased following the surgery. On May 12, 1989, Dr. Coker performed a second surgery on Mr. Shadrick in which he excised one of the discs in Mr. Shadrick's spine. Dr. Coker's notes following the second surgery indicate that Mr. Shadrick continued to experience pain in his back following the surgery. On February 5, 1990, Dr. Coker performed a third surgery on Mr. Shadrick's spine. The third surgery involved the injection of a steroid into his back. Dr. Coker's March 6, 1990 notes state that the steroid injection did not alleviate Mr. Shadrick's pain, and that following the injection "[h]is pain, in fact, is somewhat worse across his foot into his right leg in a classic distribution which he had described all along."

On March 12, 1990, Mr. Shadrick underwent a fourth surgery which is the subject of this litigation. Prior to the surgery, Mr. Shadrick signed a consent form provided by the hospital in which he consented to the performance of a "right L5-S1 laminectomy with fusion" by Dr. Coker. The surgical procedure was performed at Westside Hospital (now Centennial Medical Center), and during the procedure, Dr. Coker inserted "pedicle" screws into Mr. Shadrick's spine. In his affidavit, Mr. Shadrick states that prior to the surgery he was never informed that screws would be placed in his back. Mr. Shadrick's affidavit states that when he awoke from the operation, Dr. Coker informed him that screws had been implanted in his back. Mr. Shadrick alleges that although Dr. Coker informed him of the screw implantation, "this information did not mean anything to . . . [him] because nobody ever told . . . [him] about any risks of injury or any problems that could be caused by the screws." Mr. Shadrick states that following the surgery, Dr. Coker assured him that the use of the pedicle screws was "routine treatment" for the type of surgery performed on him. Mr. Shadrick avers that Dr. Coker never informed him that the screws were experimental, that the screws had not been approved by the Food and Drug Administration (FDA), or that the screws could cause him any problems.

Mr. Shadrick contends that following the March 12, 1990, surgery, his back condition

became worse. On September 20-26, Mr. Shadrick was hospitalized to repair a broken screw in his back. The hospital discharge summary indicates that Dr. Coker believed that the broken screw was caused by repeated falls by Mr. Shadrick. On October 31 through November 5, 1990, Mr. Shadrick was hospitalized in order to surgically remove the screws from his back. Dr. Coker's notes following the November surgery state, "Postoperatively, he continued to experience leg pain and I wonder if he simply doesn't have intraneural scar about which we will not be able to do much of anything. I discussed this with him in detail and he went on home." The discharge summary states that Mr. Shadrick continued to complain of pain in his back following the removal of the screws.

Over the course of approximately three years following removal of the pedicle screws, Mr. Shadrick continued to see Dr. Coker regarding his back pain. At one point, during the course of treatment, Mr. Shadrick's attorney wrote a letter to Dr. Coker requesting certain medical records and an explanation for Mr. Shadrick's pain. By letter dated September 13, 1991, Dr. Coker responded as follows:

In response to your second paragraph regarding trying to reconcile Donald's pain problem based on emotional as well as physical realities, there is no question that he had a ruptured disc and that his pain was consistent with that problem. I think to simplify what has happened, it might be reasonable to say that Donald's emotions have become imprinted with the pain that he initially experienced and his emotions have not let go of that pain even though his disc and nerve appear to have let go of it. This type of fixation is not unheard of but it certainly is a difficult situation to resolve. Obviously, Don has had several surgical procedures, none of which have made him any better. The differential spinal test plus the psychological tests indicated that he has a fixation on the pain which is not supported by his physical findings. This does not imply in any way that Donald is mentally deranged, it only indicates that he has unconsciously grasped the concept of having chronic pain and will not consciously dismiss that from his mind. That is the best I can do in explaining this condition to you. I might also add that Dr. Frye was very reluctant to get involved with trying to counsel this boy and I think that is a good indication of how hard it is to clear this sort of situation.

Mr. Shadrick contends that he did not discover that the screws were the cause of his "problems" until December 17, 1993, when he saw an episode of ABC's television program, "20/20," which discussed pedicle screws. Mr. Shadrick states that while viewing the "20/20" program, he first learned that the pedicle screws were experimental, and that the screws had been

found to cause a number of problems in patients.

On December 16, 1994, Mr. Shadrick filed this lawsuit against, *inter alia*, defendants Dr. Coker and Centennial Medical Center.<sup>2</sup> The complaint avers that Mr. Shadrick continues to suffer pain and other medical problems as a result of the implantation of the pedicle screws in his spine. The complaint sues Dr. Coker and CMC for medical malpractice, lack of informed consent, battery, and fraudulent misrepresentation by their failure to, *inter alia*, obtain Mr. Shadrick's consent to implant the screws, inform Mr. Shadrick that the pedicle screws were not FDA approved, inform Mr. Shadrick that the screws were experimental and classified as investigational by the FDA, and inform Mr. Shadrick of the risks associated with the pedicle screws. The complaint further avers that Dr. Coker and CMC fraudulently concealed the "true facts concerning their actions and the true nature of the pedicle or back screws and related hardware from plaintiffs."

The defendants' answers join issue on the material allegations of the complaint and assert that Mr. Shadrick's actions are barred by the statute of limitations and statute of repose for medical malpractice actions, T.C.A. § 29-26-116 (a)(1) and (3) respectively. On July 28, 1995, CMC filed a motion for summary judgment contending that Mr. Shadrick's actions are barred by the three-year statute of repose and the one-year statute of limitations. On August 7, 1995, Dr. Coker filed an identical motion for summary judgment relying on the memorandum of law filed by CMC in support of its motion for summary judgment. On October 3, 1995, the trial court filed a Memorandum and Order which granted CMC and Dr. Coker summary judgment because of the statute of limitations and statute of repose in the above statute. The Memorandum and Order states in pertinent part:

Mr. Shadrick's claim is barred. He knew that the screws had been placed in his back in March of 1990 and he acknowledged that "no one told me before the operation that the screws would be implanted." Furthermore, he knew in November, 1990 that one of the screws had broken and had to be replaced. He also stated in his affidavit that "since the surgery of March 12, 1990 my physical condition has become worse than it was before the surgery."

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<sup>2</sup>The complaint, naming various other defendants, also presents a products liability cause of action and seeks to maintain the suit as a class action. The record does not disclose any ruling by the court as to class certification.

The Court is also of the opinion that the record before the court fails to establish facts warranting the application of the fraudulent concealment exception to Mr. Shadrick's claim. *See Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn. 1992) and *Soldano v. Owens-Corning Fiberglass Corporation*, 696 S.W.2d 887, 889 (Tenn. 1985). Here, neither the doctor nor the hospital made any false statements or assertions to Mr. Shadrick. The plaintiffs contention seems to be that lack of consent is tantamount to fraudulent concealment. You prove the first and the second follows. Such is not the law. Here there was no affirmative concealment and the facts were such that the plaintiff knew or was on notice of inquiry that the implantation of the screws had been unsuccessful and possibly harmful. Even if the doctor or the hospital should have told the plaintiff more about the screws, such information does not change the fact that the plaintiff knew or should have known in 1990 that there was a problem with the screws. *Cf. Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977) and *Cooksey v. Cumberland Mental Health Services*, No. 01A01-9302-CV-00063, 1993 Tenn. App. LEXIS 552 (Aug. 18, 1993).

On November 2, 1995, Mr. Shadrick filed a Motion to Alter or Amend the order granting summary judgment which the court denied.

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.03; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Dunn v. Hackett*, 833 S.W.2d 78, 80 (Tenn. App. 1992). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Byrd*, 847 S.W.2d at 210. When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Id.* at 210-11. In *Byrd*, the Tennessee Supreme Court stated:

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

*Id.* at 211. (emphasis in original).

The summary judgment process should only be used as a means of concluding a case

when there are no genuine issues of material fact, and the case can be resolved on the legal issues alone. *Id.* at 210 (citing *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988)). Summary judgment is not to be used as a substitute for a trial of genuine and material factual issues. *Byrd*, 847 S.W.2d at 210 (citing *Blocker v. Regional Medical Ctr.*, 722 S.W.2d 660, 660-61 (Tenn. 1987)). Where a genuine dispute exists as to any material fact or as to the conclusions to be drawn from those facts, a court must deny a motion for summary judgment. *Byrd*, 847 S.W.2d at 211 (citing *Dunn*, 833 S.W.2d at 80).

Mr. Shadrick has appealed, and he presents the following issues as stated in his brief:

1. Whether the trial court erred in granting summary judgment to Centennial Medical Center and Dr. Coker and denying plaintiffs' Motion to Alter or Amend, holding that, as a matter of law, the one year statute of limitations barred the claims of Donald and Valerie Shadrick.
2. Whether the trial court erred in granting summary judgment to Centennial Medical Center and Dr. Coker and in denying plaintiffs' Motion to Alter or Amend, holding that as a matter of law, the doctrine of fraudulent concealment did not toll the applicable statute of limitations and the applicable statute of repose as to the claims of Donald and Valerie Shadrick.

Section 29-26-116 of Tennessee Code Annotated provides in pertinent part:

**Statute of limitations. - Counterclaim for damages.** -- (a)(1)  
The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

T.C.A. § 29-26-116 (1980).

Mr. Shadrick's complaint alleged medical malpractice, lack of informed consent, battery, and fraudulent misrepresentation. However, Mr. Shadrick's supporting affidavits did not address any causes of action other than lack of informed consent, and there is simply no proof to support any allegations of negligence on the part of Dr. Coker and thus, there is no proof that Dr. Coker knowingly concealed any such negligence. The only issue to consider is the allegation of the lack of informed consent and the application of the statute of limitations and the statute of

repose to this cause of action.

The complaint in this case was filed December 16, 1994, and the surgery forming the basis of Mr. Shadrick's complaint occurred in March, 1990. Basically, Mr. Shadrick's complaint alleges that defendant, Dr. Coker, performed the surgery without obtaining an "informed consent" from plaintiff, Donald Shadrick. More particularly, Mr. Shadrick asserts that the use of the pedicle screws was experimental and not approved for use by the FDA, that he was not aware of this fact and was not so informed by Dr. Coker and that if he had been so informed he would not have consented to the surgical procedure. We must first examine what disclosure is required under the applicable standard of care to obtain informed consent.

Section 29-26-118 provides:

**29-26-118. Proving inadequacy of consent.** -- In a malpractice action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining his informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which he practices and in similar communities.

T.C.A. § 29-26-118 (1980).

A physician is not required to enumerate in detail every aspect of surgery or every possible thing that might go wrong. *Longmire v. Hoey*, 512 S.W.2d 307 (Tenn. App. 1974).

In general, under or apart from statute, the doctrine of informed consent requires a physician or other health-care provider to furnish an individual with information sufficient to enable the individual to give an intelligent, informed consent to a proposed medical treatment or the performance of a particular medical procedure.

70 C.J.S. *Physicians and Surgeons* § 93 (1987).

In opposition to the motions for summary judgment, Mr. Shadrick filed the affidavit of Dr. Raymond O. Frederick which generally states the standard of care for physicians and hospitals in Nashville, Tennessee at the time of the operation in question. The affidavit outlines the standard of care as follows:

1. The hospital has a duty to review investigational studies, research and clinical trials conducted in the hospital, including those associated with pedicle screws, and the hospital must obtain written informed consent of the patients to participate in investigational studies and/or

clinical trials.

2. The hospital must obtain written informed consent from the patient when the patient is the recipient of an investigational device, including any device implanted in the pedicle spine.

3. The hospital must make sure that the patients who receive pedicle screw implants are fully advised that those implants are not approved for use in the pedicle spine except through investigational studies, and to be sure that the patients fully understood all risks and alternative available treatment, whether surgical or non-surgical.

4. A surgeon must advise patients of all material risks and consequences that are associated with a surgical procedure.

5. Both CMC and Dr. Coker had a duty to obtain written informed consent.

6. Both CMC and Dr. Coker had a duty to inform Mr. Shadrick of the investigational or experimental nature of pedicle implant devices.

7. The informed consent should have explained all of the risks associated with investigational implants.

8. CMC and Dr. Coker both knew or should have known that the pedicle screw implants were investigational devices. CMC had a duty to know whether investigational devices were being used in its operating rooms, and both CMC and Dr. Coker had a duty to know whether the pedicle screw implants used in Mr. Shadrick were investigational devices at the time of the implant.

9. Use of pedicle screw implants was a surgical risk that CMC and Dr. Coker knew or should have known about, and they should have informed Mr. Shadrick of the risk.

10. Mr. Shadrick should have been informed that the pedicle screws were investigational, which means that they had not been proven safe and effective for use in the pedicle spine in the eyes of the FDA.

11. The failure to communicate these facts to Mr. Shadrick was tantamount to failure to obtain informed consent.

12. The consent form signed by Mr. Shadrick did not come close to satisfying the hospital's or the doctor's duty to obtain informed consent.

13. Both CMC and Dr. Coker violated the applicable standard of care with respect to informed consent with respect to Mr. Shadrick.

Both defendants, CMC and Dr. Coker, assert that Mr. Shadrick discovered his cause of action in March of 1990 because when he awoke from surgery he was told that pedicle screws had been implanted in his back, and he knew that this was the first time that he was aware such a procedure was involved. They further assert that if there was no “discovery” of his cause of action in March of 1990, that there was certainly a “discovery” in November of 1990, when Mr. Shadrick was informed that one of the screws had broken necessitating a second surgery to remove the broken screw. They argue that he knew that the screws had been implanted in his back without any consent and that one of the screws had broken necessitating a second surgery, and that in the exercise of reasonable care and diligence he should have discovered that he had a cause of action at that time. We do not disagree that this argument has merit so far as it applies to the negligence or a traditional-type malpractice action. *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974). However, there is a distinction between a typical negligence malpractice case and a case involving lack of informed consent which is in the nature of an assault and battery case. In a lack of informed consent case, the physician can be held liable for injuries regardless of whether such injuries resulted from negligence or otherwise. *Ray v. Scheibert*, 484 S.W.2d 63, 71 (Tenn. App. 1972).

Under the state of the record before us, there is a disputed issue of material fact as to whether the standard of care in Nashville, Tennessee in 1990 required a disclosure of the lack of FDA approval and the experimental nature of the use of pedicle screws. The fact that right after surgery Mr. Shadrick was informed that pedicle screws had been implanted and then later was told that a pedicle screw had broken does not put him on notice that the procedure was experimental at the time it was performed. Thus, we must respectfully disagree with Dr. Coker and CMC that Mr. Shadrick “discovered” his cause of action for lack of informed consent in 1990.

Having established that there is a disputed issue of material fact as to whether there was a lack of informed consent in 1990, we must now determine whether the three-year statute of repose will bar Mr. Shadrick’s suit.

Irrespective of the date that a plaintiff discovers his or her cause of action for medical malpractice, the statute of repose in T.C.A. § 29-26-116(a)(3) operates as an outer limit in which a plaintiff may file an action. The statute of repose begins to run on the date of the alleged act

of malpractice, rather than on the date a plaintiff discovers the injury. *Benton v. Snyder*, 825 S.W.2d 409, 413 (Tenn. 1992); *Braden v. Yoder*, 592 S.W.2d 896, 897 (Tenn. App. 1979). However, as provided in T.C.A. § 29-26-116(a)(3), the three-year bar may be tolled where there is fraudulent concealment on the part of the defendant, and in that case, the action must be brought within one year after the discovery that the cause of action exists. Where the statute of repose defense is established, the burden of proof shifts to the plaintiff to establish the claimed exception to the statute. *Benton*, 825 S.W.2d at 414.

To meet the burden of proof required, a plaintiff seeking to toll the statute of limitations on the ground of fraudulent concealment must prove that the cause of action was known to and fraudulently concealed by the defendant. *Id.* In *Benton*, the Court said:

Generally, a plaintiff seeking to establish fraudulent concealment must prove that the defendant took affirmative action to conceal the cause of action and that the plaintiff could not have discovered the cause of action despite exercising reasonable diligence. *Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977). Generally, the affirmative action on the part of a defendant must be something more than mere silence or a mere failure to disclose known facts. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry, *or else there must be a duty resting on the party knowing such facts to disclose them.* *Patten v. Standard Oil Co. of Louisiana*, 165 Tenn. (1 Beeler) 438, 443, 55 S.W.2d 759, 761 (1933). For example, such a duty arises where a confidential relationship exists, as between physician and patient. In such cases, *there is a duty to disclose, and that duty may render silence or failure to disclose known facts fraudulent.* *Hall v. De Saussure*, 41 Tenn. App. 572, 580-84, 297 S.W.2d 81, 86-87 (1956), *aff'd* 201 Tenn. (5 McCanless) 164, 297 S.W.2d 90 (1956). This is the rule in Tennessee and in other jurisdictions. *See, e.g., Lasoya v. Sunay*, 193 Ga. App. 814, 389 S.E.2d 339 (1989); *Borderlon v. Peck*, 661 S.W.2d 907 (Tex. 1983).

825 S.W.2d at 414 (emphasis in original).

Dr. Coker had a fiduciary relationship with Mr. Shadrick, and if the standard of care is as outlined in Dr. Frederick's affidavit, Dr. Coker was duty bound to inform Mr. Shadrick of the experimental nature of the use of pedicle screws. Charged with this knowledge, Dr. Coker's silence in the face of Mr. Shadrick's problems with the screws, raises a genuine issue of material fact as to whether there is a fraudulent concealment that would toll the three-year statute of repose.

As to CMC, however, although there is a disputed issue as to whether CMC owed a duty to obtain the informed consent, the record contains no evidence of a continuing relationship

between CMC and Mr. Shadrick. Moreover, the relationship between Mr. Shadrick and CMC is not a fiduciary relationship and there is absolutely nothing in the record to show any affirmative action on the part of this defendant to conceal any facts from Mr. Shadrick. Therefore, the statute of repose bars any claim against CMC.

Accordingly, the order of the trial court granting summary judgment to CMC is affirmed. The order granting summary judgment to defendant Dr. Coker on the cause of action for lack of informed consent is vacated but is affirmed as to all other causes of action against this defendant. The case is remanded to the trial court for further proceedings consistent with this Opinion. Costs of the appeal are assessed one-half to appellants and one-half to appellees.

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**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

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**ALAN E. HIGHERS, JUDGE**

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**BEN H. CANTRELL, JUDGE**